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ORIGINAL

Before the

SURFACE TRANSPORTATION BOARD

Ex Parte No. 582 (Sub-No.1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS

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Due Date: November 17, 2000

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SURFACE TRANSPORTATION BOARD

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COMMENTS

John D. Fitzgerald,[1/] for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits these comments in response to Notice of Proposed Rulemaking (NPR), dated September 25, 2000 (served October 3, 2000). 65 Fed. Reg. 58974-81 (October 3, 2000). The NPR seeks public comment on proposed modifications to the STB's regulations governing proposals for major rail consolidations.

UTU/GO-386 has been a participant in this proceeding, filing Comments in response to the ANPR on May 16, 2000 (JDF-1), and Reply Comments on June 5, 2000 (JDF-2);[2/] UTU/GO-386 was a participant in the earlier BNSF/CN proceeding until terminated by the March 16, 2000 (served March 17, 2000) STB decision which

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1/ General Chairman for United Transportation Union on lines of The Burlington Northern and Santa Fe Railway Company, with offices at 400 E. Evergreen Boulevard, Vancouver WA 98660.

2/ UTU/GO-386 earlier on April 18, 2000, filed a Notice of Intent.

imposed a 15-month moratorium for certain unification proceedings;[3] and UTU/GO-386 also submitted Comments on February 29, 2000 in response to Ex Parte No. 582, Public Views on Major Rail Consolidations, dated January 21, 2000 (served January 24, 2000) 65 Fed.Reg. 4568-70 (January 28, 2000)(Public Views).[4] In addition, UTU/GO-386 has been an active party to the recent railroad consolidation applications processed by the ICC and STB, including the BN/SF, UP/SP, CN/IC, and CSX/NS/CR proceedings.[5]

The primary concern of UTU/GO-386 is with the so-called "Northern Lines" of the former BN, and its antecedent components.[6]

Background

This NPR is a sequel to the STB's earlier ANPR of March 30, 2000 (served March 31, 2000), 65 Fed. Reg. 18021-26 (April 6, 2000), wherein UTU/GO-386 submitted Comments (JDF-1) and Reply Comments (JDF-2).

The NPR served October 3, 2000, mentioned that comments/reply comments had been submitted by John D. Fitzgerald

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3/ See: Pleadings filed January 18 (JDF-1), and March 1, 2000 (JDF-2) in BNSF/CN.

4/ UTU/GO-386 did not make an oral presentation of its February 29 comments at the STB's four-day March hearing, and did not participate in judicial review of the moratorium. Cf. Western Coal Traffic League v. Surface Transp. Bd., 216 F.3d 1168 (D.C. Cir. 2000).

5/ Unless otherwise indicated, the abbreviations and citations employed in these Comments are the same as those set forth in the NPR at 69-76 Appendix A, and at 77-78 Appendix B.

6/ Great Northern Railway Company; Spokane, Portland & Seattle Railway Company; and Northern Pacific Railway Company.

and/or UTU/GO-386,(NPR 5, 62, 62n.35, 187-88), although the STB did not accorded an acronym, NPR 69-76. This commentor does not consider the NPR's summation of UTU/GO-386 comments/reply comments to have been adequate; accordingly, these earlier pleadings should be considered in connection with the instant comments directed to the NPR.[7/]

I. THE NPR DOES NOT ADEQUATELY SET FORTH THE SCOPE OF THE PROPOSED REGULATIONS.

The NPR does not correctly set forth the scope of the proposed regulations, with respect to the transactions and carriers involved, and the extent to which the "regulations" may be considered binding.

A. Major Rail Consolidation Procedures. Although the NPR is titled, "Major Rail Consolidation Procedures," and purports to involve only "major" transactions, i.e., those involving the merger or control of at least two Class I rail carriers, in actual fact, the proposed regulations go far beyond "major" consolidation proposals. The NPR extensively revises present regulations applicable to transactions other than those deemed "Major," i.e., "significant" and "minor" proceedings. This is clear from the proposed §§ 1180.0, 1180.3(a), 1180.3(b), 1180.4(-a)(4), 1180.4(b)(4), 1180.4(c)(6), 1180.4(d), 1180.7(a), and 1180.11, which revise procedures for significant and minor transactions. The NPR does not provide the public and railroad employ-

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7/ It is requested that the STB also review this commentor's submission in Public Views, as well as the earlier pleadings in BNSF/CN.

ees of due process, by the NPR's failure to adequately announce important changes for other than major rail consolidations.

B. Policy Statement or Regulation. The NPR states it is proposing modifications to its "regulations," yet the NPR states that the "centerpiece" is a new policy statement. (NPR 9). The NPR would substitute a new policy statement, § 1180.1, "General policy statement for merger or control of at least two Class I railroads," for the present § 1180.1 bearing the same caption. (NPR 11-22). This is not a "regulation." The proposed regulations are set forth as "Proposed Technical and Informational Revisions,"(NPR 22-37).

The NPR appears to have confused a rule or regulation, on the one hand, with a policy statement, on the other hand. The ICC first approved a policy statement for railroad consolidations in 1978, subsequent to the 4-R Act. Railroad Consolidation Procedures, 359 I.C.C.195 (1978), revised at 363 I.C.C. 784 (1981). The ICC emphasized that the policy statement is not binding, and can be challenged when applied. 359 I.C.C. at 195-96:

> We emphasize that we are adopting a policy statement, not a regulation. The statement is intended to offer guidance to parties planning and participating in railroad consolidation proceedings...It does not establish a binding norm, and it is not finally determinative of the issues or rights which it discusses. When the policy enunciated in the statement is applied in a specific proceeding, parties to that proceeding will have the opportunity to challenge or support the policy through appropriate evidence or argument.

The ICC reiterated the non-binding nature of the policy statement when it revised the policy, 363 I.C.C. at 790-91:

> The policy statement accurately reflects the policies we have followed in our recent proceedings, and offers

> guidance to parties planning and participating in consolidation proceedings. However, the policy statement adopted here is a statement of general policy only. Parties will have the opportunity to challenge these policies through appropriate evidence or argument in individual cases.

The NPR errs in failing to indicate that the proposed policy statement is not binding, and is subject to very limited judicial review. For the differences between a regulation and a policy statement, see: Assure Comp. Transp. v. United States, 635 F.2d 1301 (7th Cir. 1980); Farmland Industries, Inc. v. United States, 642 F.2d 208 (7th Cir. 1981); American Bus Ass'n v. United States, 627 F.2d 525 (D.C. Cir.1980); Molycorp, Inc. v. U.S.E.P.-A., 197 F.3d 543 (D.C. Cir. 1999); ANR Pipeline Co. v. F.E.R.C., 210 F.3d 403 (D.C.Cir. 2000).

Any final rules should carry the non-binding clause which characterized adoption of the present policy statement in 1978 as revised in 1981.

II. THE PROPOSED POLICY STATEMENT AND REGULATIONS DO NOT SOLVE THE SECRECY PROCESS--THE HEART OF THE STB'S PROBLEM.

The recent railroad consolidations which have been approved by the STB have not gone well. Serious disruptions have occurred to the detriment of the commerce of the Nation, resulting in lower output of goods and services. Railroad employees have shared in this suffering, as have shippers and communities, and the public generally.

With such service problems a recurring phenomenon, the natural inquiry is why such disasters were not foreseen in the process of approval. What is different, for example, about UP/SP

and CSX/NS/CR, with serious disruptions, which were not present, for example, in BN/Frisco or in UP-MP-WP?[8/] The answer appears clear. The process adopted by the STB for inquiring into the merits of a major rail consolidation proposal has changed. A closed and secret process for the development of evidence, and its evaluation by the select few, has been substituted for the formerly open procedures which encouraged full participation by the public, and examination of the record by many persons. An open and complete record tends to unearth problems, which then may be evaluated and addressed in a timely fashion.

A. Prefiling Procedures. The NPR would continue, and enlarge, the prefiling process whereby carriers and STB Staff, behind closed doors, determine the initial evidentiary framework and requirements for the forthcoming application. The prefiling period may be up to 6 months before the application is projected to be filed, with the application to be decided within one year after the application is accepted for filing. It is clear where the real merger decisional process takes place--between attorneys for applicants and agency Staff. The rules against ex parte communications come into play after an application is accepted and noticed for the taking of evidence. 49 CFR 1102.2(e). Moreover, STB staff is permitted to be involved in ex parte communications after the application is accepted, so long as a memoran-

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8/ Burlington Northern, Inc.-Control & Merger-St.L., 360 I.C.C. 788 (1980); Union Pacific-Control-Missouri Pacific; Western Pacific, 366 I.C.C.462 (1982).

dum is placed in the public docket. 49 U.S.C. 11324(f).9/

B. Hearings. The STB did not conduct public hearings in its recent consolidation proceedings. The STB does not have a single Administrative Law Judge (ALJ). Even when the agency last had an ALJ, who conducted extensive hearings, the ALJ frequently did not render an Initial Decision; the record was merely certified to the agency, i.e., the Staff. The only "hearings" in UP/SP and in CSX/NS/CR were conducted by an ALJ from another agency, and the hearing was restricted to discovery issues. Moreover, most of these "hearings" were closed to the public, and were conducted in Washington, DC.

In contrast, until recently, major rail consolidation proposals were the subject of local hearings, to allow input from the public and for examination of carrier statements. The ALJ assisted in the process of developing an adequate record, even if the record ultimately was certified to the agency without an ALJ's Initial Decision. Under this hearing procedure potential problems were discovered and analyzed. Railroad employees frequently appeared at local hearings, and contributed to the evidentiary process--particularly with respect to operating matters.

C. Secret Procedures. Current practice at the STB allows much, if not most, of the critical evidence adduced after the application is accepted to be placed under seal. This was very rare in railroad consolidation proceedings until recently.

9/ There is no requirement that parties to a proceeding be notified that an item has been placed in the STB's public docket, and in actual practice agency staff does not provide such notification.

The secret critical materials, and thus an important part of the proceedings, have a limited audience, and the scope of analysis by the public and by all parties is circumscribed. Secrecy comes at a high price to the knowledge process--government agencies should keep secrecy at the absolute minimum--particularly where, as here, defense matters rarely are involved. See: Moynihan, Daniel P., Secrecy (Yale Univ. Press, 1998).

D. Ex Parte Contacts. It is common knowledge that railroad executives frequently have private audiences with STB members, particularly its Chairperson. Such private meetings also are conducted by Board members with others in the transportation industry, including heads of trade organizations and employee representatives. Congress in sunsetting the former ICC amended the railroad consolidation provisions for a Class 1 carrier, so as to explicitly disclaim any requirement that the transaction be considered an adjudication required to be determined on the record after opportunity for agency hearing, and Congress explicitly acted to permit ex parte communications, even on the merits of a proposal, so long as a written summary is placed in the public docket. 49 U.S.C 11324(f). Of course, the STB states it does not encourage ex parte contacts, but the definition of such proscribed contacts allows unfortunate practices. See: Pet. to Establish Proc. Regarding Ex Parte Communications, 1 S.T.B. 1083 (1996).

Closed private gatherings should not serve as a substitute for the development of a public record, and for the interaction of views within the transportation industry through an open pro-

cess. The STB should disavow secrecy, except in a dire emergency. Moreover, this is a situation which appears to call for remedial legislation.[10/]

E. Diskette Requirements. The requirement that all submissions, even those of a single page, be accompanied by a diskette in, or convertible by and into WordPerfect 9.0,[11/] precludes participation by large numbers of the public. No other agency makes such a requirement for filings in major proceedings. This diskette requirement, which is in addition to the availability of all filings by the scanning process (NPR at 38), is unconscionable. This diskette requirement is part of the limited information and secrecy process which, if past is prologue, will lead to further service disruptions and service inadequacies--so contrary to the national interest.

III. THE NPR INCORRECTLY SETS FORTH THE BASIS FOR THE PRESENT MERGER POLICY; AND PROPOSES A FLAWED FUTURE POLICY.

The NPR claims the existing policy for merger or control of two or more Class 1 rail carriers[12/] is "pro-merger" and was established at a time when "(r)ailroads desperately needed to reduce excess capacity and increase the efficiency of their

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10/ The secrecy process of the STB is not confined to railroad consolidation proceedings, but permeates the agency. For example, see: Cloak of Secrecy, 264 Traffic World 16 (Nov. 13, 2000), involving meetings of the Railroad-Shipper Transportation Advisory Council. 49 U.S.C. 726.

11/ See: NPR 1, 38.

12/ There is no policy statement for railroad consolidations other than for merger/control of two or more Class 1 carriers, and none has ever existed. The NPR would continue this void.

operations." (NPR 9-10, 11, 12). The NPR asserts the current policy statement was "unequivocally" geared toward assisting railroads in eliminating excess capacity. (NPR 11).

The NPR opines that railroads now have reduced most or all of their "excess capacity," and have greatly improved efficiency of operations. (NPR 10). Accordingly, the NPR would shift the policy so as to require "enhanced competition" as an offset to negative impacts from service disruptions and competitive harms." (NPR 1, 9-10, 11, 12, 13, 14, 15, 16, 30, 31, 32, 34).

A. The Excess Capacity Myth. The national policy toward railroads, and the present policy statement, are not "pro-merger," contrary to the NPR. (NPR, 9). Rather, the national directive is toward a limited number of systems. See: Penn-Central Merger Cases, 389 U.S. 486 (1968); St Joe Paper Co. v. Atlantic Coast Line R. Co., 347 U.S. 298, 315-21 (1954). The current merger policy statement was not designed to have the agency eliminate or reduce excess rail capacity. Indeed, the ICC stated any plant rationalization should be through private initiatives, not by government intervention. Railroad Consolidation Procedures, 359 I.C.C. 195, 198 (1978). Cf. Railroad Consolidation Procedures, 363 I.C.C. 784, 791 (1981). Moreover, there is no discussion in the cited ICC policy statement decisions concerning the character of the railroad capacity deemed to be in excess, i.e., trackage, car supply, locomotives, other equipment, etc.

The decisions of the ICC and STB over the last twenty years have not authorized consolidations of class 1 carriers based upon any asserted need to reduce capacity. The ICC and STB since 1981

have pointed to the § 1180.1 merger policy statement in passing upon major carrier merger/control proceedings, but without reference to the oblique "excess capacity" phrase intended for non-regulatory correction. The existence of "duplicative facilities" does not equate with "excess capacity;" frequently it is the merger which creates, not causes, duplicate facilities. See: Norfolk Southern Corp.-Control-Norfolk & W. Ry. Co., 366 I.C.C. 171, 192 (1982); Union Pacific-Control-Missouri Pacific; Western Pacific, 366 I.C.C. 459, 486 (1982); Milwaukee-Reorganization-Acquisition by GTC, 2 I.C.C.2d 161, 210 (1984); Santa Fe Southern Pacific Corp.-Control-SPT Co., 2 I.C.C.2d 709, 724 (1986); Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 366 (1996); Burlington Northern ET AL--Merger--Santa Fe Pacific ET AL, 10 I.C.C.2d 661, 727-29 (1995); and Union Pacific Corporation, ET AL--Control--Chicago and North Western, ET AL (F.D. No. 32133, Dec. No. 25, at 55-57)(not printed)(served March 7, 1995).

The NPR's "excess capacity" contention is a fabrication. A mission to reduce "excess capacity" through class 1 rail mergers does not exist for the ICC and STB; in any event, such "excess capacity" concept has not been applied by the agency in the administration of the 1981 policy statement.[13/]

B. "Enhanced Competition". The important emphasis placed upon an undefined "enhanced competition" requirement in the proposed revised policy statement would mark a significant change in the standards to govern Class 1 merger and control

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13/ The NPR recognizes that certain of its regulations have not actually been followed for many years. (NPR 25).

decisions. To promote enhanced competition is to promote inequality among users of carrier services.

Heretofore, the STB's standard has been to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them with the advantages...to assist in effectuating the overall transportation policy." McLean Trucking Co. v. U.S., 321 U.S. 67, 87 (1944). The transportation policy is a key criterion to govern the agency in passing upon proposed consolidations. See: N.Y.Central Securities Co. v. U.S., 287 U.S. 12, 25 (1932); United States v. Lowden, 308 U.S. 225, 230 (1939); McLean Trucking, supra at 79-80 and 85-87; Seaboard Air Line R. Co. v. U.S., 382 U.S. 154, 156 (1965); Texas v. United States, 292 U.S. 522, 530-31 (1934).

There have been changes in the Transportation Policy since that set forth in 1920.[14/] These occurred in 1940 and in 1980.[15/]

The present class 1 merger/control policy was revised in 1981 after enactment of the present rail transportation policy.The ICC expressly acknowledged that the 1980 rail transportation required a revised policy. Railroad Consolidation Procedures, 363 I.C.C. 784, 785-86 (1981). Accordingly, the STB in proposing an "enhanced competition" requirement is going against prior judicial interpretation that curtailment of competition is

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14/ See: New England Divisions Case, 261 U.S. 184, 189 (1923).

15/ There were minor changes in 1995, not relevant here. See: H. Rept. 104-22 (Conf.), ICC Termination Act of 1995, at 166 (1995).

the issue, and also against the agency's own policy statement issued in light of the current rail transportation policy.

The STB's justification for an "enhanced competition" standard thus does not come from present or prior law, but purportedly stems from the agency's recent approval of behemoth consolidations. However, the "enhanced competition" lacks a rational basis for future transactions, for it extends beyond merely trying to address curtailment of competition which might result from the transaction. It should be noted that elements of the rail transportation policy dealing with competition appear directed to intra and intermodal competition, rather than to competition between users of carrier services. 49 U.S.C. 10101a (1),(4),(5),(6).

IV. THE PROPOSED TECHNICAL AND INFORMATIONAL REVISIONS ARE FLAWED IN CERTAIN RESPECTS.

This commentor has certain objections and suggestions concerning the proposed revisions to § 1180.3-11. (NPR 23-37).

§ 1180.3 Definitions. The revision would exclude subsidiaries of an applicant if such entities are non-carriers. This change should not be adopted. Full disclosure of a rail carrier's non-carrier family members remains justified. Prior waiver decisions may have been wrongly decided.

§ 1180.3(b): Applicant carriers. The revision would exclude inclusion of all carriers related to the applicant. Prior waiver decisions may have been wrongly decided. Full disclosure of all related carriers is required. Moreover, the requirement

for including carriers should be clarified to mean all carriers, whether or not regulated by the STB, and irrespective of mode.

§ 1180.4(c)(6): Application format. The revision would allow applicant to submit consolidated data for itself and all affiliated applicant carriers, in one package. This should not be adopted. It, along with other revisions and the policy statement, serve to promote secrecy. Rail employees have a special interest in having data segregated by carrier. Prior waiver decisions may have been wrongly decided.

§ 1180.6(b)(6): Corporate chart (exhibit 11). The revision would eliminate the present requirement that all common officers and directors be listed, and substitute therefore a listing requirement for only those officers and directors of a different corporate "family." This should not be adopted. It is another of the added secrecy features in the STB process.

§ 1180.6(b)(8): Intercorporate or financial relationships. The revision would limit required disclosure of intercorporate or financial relationships to those exceeding 5% of a non-affiliated carrier. This should not be adopted. Full disclosure, not greater secrecy, should be the rule.

§ 1180.6(b)(10): Conditions to mitigate and offset merger harms. The revision would require applicants to propose conditions which should not simply preserve, but also enhance competition. This should not be adopted for reasons, among others, mentioned in discussion of the merger policy statement.

§ 1180.6(b)(11): Calculating public benefits. The "enhanced competition" showing should be deleted from the proposed revision.

§ 1180.7 Market analyses. The "enhanced competition" showing should be deleted from the proposed revision.

Respectfully submitted,

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Attorney for John D. Fitzgerald

November 17, 2000

Certificate of Service

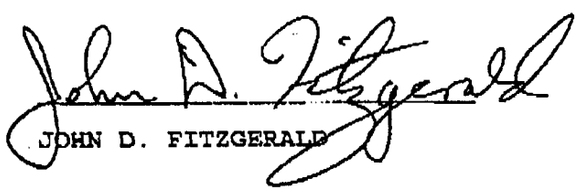
I hereby certify I have served a copy of the foregoing upon all parties of record shown on the Board's special service list for this proceeding, by first class mail postage-prepaid.

GORDON P. MacDOUGALL

Washington DC

VERIFICATION

Under the penalties of perjury. I affirm that the foregoing comments are true and correct as stated.



JOHN D. FITZGERALD

Dated at
Vancouver, WA
November 17, 2000